Filed 1/7/09 City of LA v. WCAB CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CITY OF LOS ANGELES, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and ALEX JOHNSON, Respondents.	B204479 (WCAB Nos. MON 0254221, MON 0218372, MON 0218370, MON 0218369, MON 0218367, MON 0180296)

PROCEEDING to review a decision of the Workers' Compensation Appeals Board. Affirmed in part, annulled in part and remanded with instructions.

Pierce & Weiss, Jay H. Harris and Sun Young Park for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Berkowitz & Cohen and Elliot S. Berkowitz for Respondent Alex Johnson.

The City of Los Angeles (City) petitions for a writ of review of a decision by the Workers' Compensation Appeals Board (WCAB). The City employed respondent Alex Johnson, who sustained several injuries at work and received workers' compensation awards for permanent disability. Johnson claimed additional injuries at work for which he received a joint award of permanent disability. Johnson petitioned to reopen the joint award and was awarded increased permanent disability without apportionment by the WCAB. The City contends that the WCAB lacked subject matter jurisdiction to award the increased permanent disability because Johnson filed the petition to reopen more than five years after the date of injury under the Labor Code.[1] The City also maintains that even if the WCAB had subject matter jurisdiction, the legislative changes of Senate Bill No. 899 (2003–2004 Reg. Sess.) that were enacted on April 19, 2004 (Stats. 2004, ch. 34, § 49) required the increased permanent disability to be apportioned by the permanent disability awarded prior to the joint award or the disability caused by degenerative disease of the knees.

We conclude that the WCAB had continuing jurisdiction to award the increased permanent disability because the City failed to raise at trial the running of the applicable statute of limitations period of five years after the date of injury and waived the issue. In addition, the joint award adjudicated apportionment by the previously awarded permanent disability and prior degenerative disease of the knees and may not be reopened under the provisions of Senate Bill No. 899. But the joint award did not finally adjudicate apportionment of the *increased* permanent disability caused by the subsequent degenerative disease of the knees. Considering the complex nature of the facts and changes in apportionment under Senate Bill No. 899, we conclude that the City should be afforded an opportunity to demonstrate whether the *increased* permanent disability should be apportioned by the degenerative disease of the knees after the joint award. Accordingly, the WCAB's decision is affirmed in part and annulled in part, and the

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[1] All further statutory references are to the Labor Code unless indicated otherwise.

matter is remanded for further proceedings regarding apportionment of the *increased* permanent disability.

BACKGROUND

Alex Johnson sustained various industrial injuries while working as a sanitation truck operator for the City for over 20 years. Johnson injured his neck, back, and shoulders at work on July 25, 1975. Johnson and the City stipulated to a workers' compensation award of 44 percent permanent disability. Johnson also injured his right shoulder at work on July 31, 1987, and stipulated with the City to an award of 13 percent permanent disability. On March 28, 1991, Johnson injured his right knee at work and stipulated with the City to an award of 35 percent permanent disability.

Johnson also claimed other injuries at work, including to the right side on May 1, 1991; left knee on September 6, 1994, and March 23, 1995; right shoulder on May 1, 1996; and left shoulder on July 30, 1996. In addition, Johnson claimed cumulative injury to the neck, back, shoulders, and knees due to work from 1981 to September 1998.

Johnson and the City agreed to a medical evaluation by orthopedic surgeon Roger Sohn, M.D. In a report dated March 3, 1998, Dr. Sohn recommended work restrictions for the neck, back, shoulders, and knees and apportioned the permanent disability to various injuries. Dr. Sohn also assigned the same work restrictions to the left knee that were assigned to the right knee by the previous agreed medical evaluator, Alexander Angerman, M.D. In subsequent reports, Dr. Sohn indicated that Johnson's injuries had reached maximum medical improvement or a permanent and stationary status at the same time.

The parties submitted the matter to the workers' compensation administrative law judge (WCJ), who issued permanent disability rating instructions for the various dates of injuries, body parts, and work restrictions based on the opinion of Dr. Sohn. The WCJ apportioned 50 percent of the right shoulder disability to the injury of May 1, 1996, and 50 percent to the cumulative injury. The left shoulder disability was apportioned to the cumulative injury. The left knee disability was apportioned to the injury of September 6, 1994, while the right knee disability was apportioned to the injury of March 28, 1991.

The neck and back disability was apportioned equally between the cumulative and March 23, 1995 injuries. The WCJ also instructed the rater of permanent disability to apply *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 496–501 (*Wilkinson*) (permanent disability rating from successive injuries combined where same employer, body part, and permanent and stationary date), except to the right knee injury, which became permanent and stationary earlier on January 5, 1994, as indicated by Dr. Angerman's report of March 1, 1995.

The WCJ's instructions produced a permanent disability rating of 42 percent for the spine and 13 percent for the shoulders under *Wilkinson*, and a final permanent disability rating of 51 percent using the Multiple Disabilities Table. On May 9, 2001, the WCJ issued a joint findings and award that permanent disability was 51 percent and the permanent and stationary date for the right knee injury was January 5, 1994.

On or about August 9, 2001, Johnson filed a petition to reopen under the WCAB case number for the cumulative injury claim, MON 0254221. Johnson alleged that his condition had worsened, with need of further temporary and permanent disability, vocational rehabilitation benefits, and medical care.

In a report dated December 2, 2002, Dr. Sohn stated that Johnson's condition was remarkably similar to what was reported previously and his opinion had not changed. But in a report dated June 2, 2006, Dr. Sohn said that Johnson's knees and shoulders had significantly worsened and permanent disability had increased. X-rays of Johnson's knees showed severe degenerative disease. Dr. Sohn apportioned 50 percent of the increased knee disability to the industrial history and 50 percent to the degenerative disease caused in part by Johnson being 70 years old and weighing 360 pounds.

The parties proceeded to trial to determine whether the increased permanent disability reported by Dr. Sohn was subject to apportionment pursuant to sections 4663[2]

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[2] Section 4663 states in part: "(a) Apportionment of permanent disability shall be based on causation. [¶] (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the
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and 4664,[3] which became effective under Senate Bill No. 899 on April 19, 2004. The parties stipulated that Johnson "has shown good cause to reopen his case for new and further disability"; Johnson previously received an award of 35 percent permanent disability for the right knee injury of March 28, 1991; and the increased permanent disability reported by Dr. Sohn is 89 percent. The City contended in its posttrial brief that Johnson "filed a timely petition to reopen MON 254221 et al."; "[b]ecause there is a timely petition to reopen, [the City] is entitled to a monetary (dollar) reduction for monies previously paid on the [findings and award] dated 5/9/01 rather than a percentage credit"; "[a]s for the earlier stipulated Awards for injury dates of 7/31/87 and 7/25/75, no apportionment was allowed due to a finding that [Johnson] had rehabilitated himself"; and "[t]he [agreed medical evaluator] report of Dr. Roger Sohn constitutes substantial medical evidence to allow legal apportionment to pathology pursuant to Labor Code section 4663."

The WCJ issued findings and award that "[g]ood cause has been shown to reopen these matters for new and further disability" and that the increased permanent disability is 89 percent without apportionment under sections 4663 and 4664. The WCJ awarded Johnson permanent disability indemnity totaling $137,425, payable at $230 per week, followed by a life pension at $112 per week, with credit for indemnity previously paid.

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issue of causation of the permanent disability. [¶] (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries."

[3] Section 4664, subdivision (b), hereafter section 4664(b), states: "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof."

In the opinion on decision, the WCJ explained that the findings and award was based on the stipulations of the parties and Dr. Sohn's opinion. The City did not carry its burden of proof for apportionment of the increased permanent disability under *Vargas v. Atascadero State Hospital* (2006) 71 Cal.Comp.Cases 500 (*Vargas*).[4] The City revealed the prior stipulated awards for the first time in its posttrial brief, but Johnson's prior permanent disability was medically rehabilitated according to the law at the time of the awards and cannot be altered. Apportionment of the previously awarded right knee disability and the left knee disability with the same work restrictions was also previously decided under the joint findings and award. Although the medical records indicated Johnson had degenerative disease of the knees since 1992, Dr. Sohn did not apportion between the increased permanent disability that arose before and after the joint findings and award.

The City petitioned the WCAB for reconsideration and contended that there was no jurisdiction to award new and further knee disability because the petition to reopen was filed more than five years after the date of injury. Although jurisdiction had not been raised at trial, the City claimed subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel, and may be raised on appeal according to *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 721–722, 731–736 (*Consolidated Theatres*) (remand to determine whether National Labor Relations Board would decline jurisdiction of dispute between theater owners and union based on

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[4] In *Vargas*, the WCAB en banc held that "(1) The new apportionment provisions of SB 899 apply to the issue *increased* permanent disability alleged in any petition to reopen (see sections 5803, 5804, 5410) that was pending at the time of the legislative enactment on April 19, 2004, regardless of the date of injury; [¶] (2) Consistent with Section 47 of SB 899, the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004; and [¶] (3) In applying the new apportionment provisions to the issue of *increased* permanent disability, the issue must be determined without reference to how, or if, apportionment was determined in the original award." (*Vargas, supra,* 71 Cal.Comp.Cases at p. 502.)

published regulations and decisions) and *Summers v. Superior Court* (1959) 53 Cal.2d 295 (*Summers*) (jurisdiction not conferred by trial court hearing over court reporter's fee for transcript). The City argued that the previously awarded right knee disability was never applied to the total level of permanent disability, and applying Dr. Sohn's apportionment to the increased knee disability would not change the prior awards under *Vargas*. Even though evidence of the prior stipulated awards was not introduced in a timely manner, judicial notice of the awards and apportionment is mandatory.

In the report on reconsideration, the WCJ concluded that the petition to reopen provided jurisdiction over the joint findings and award under *Wilkinson* and is final. The WCJ explained, "It is the award that is being reopened; not the individual injuries that were the subject matter of that award. If [the City] wanted to claim that a Petition to Reopen a joint award is only timely as to the injuries that were sustained in the previous five years, it should have raised the issue at trial." Even if the prior awards are considered, the WCJ reasoned, *Vargas* precludes apportionment to permanent disability that had been rehabilitated or apportioned to pathology that existed before the joint findings and award, according to the law in effect at the time.

The WCAB adopted the WCJ's decision and report and denied the City's petition for reconsideration. The WCAB noted that the record confirmed that the joint findings and award included apportionment for the previously awarded right knee disability.

The City petitions for a writ of review, contending that the WCJ lacked subject matter jurisdiction to award new and further knee disability because the petition to reopen was not filed within five years after the date of injury as required under section 5410[5] or

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[5] Section 5410 provides: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation, including vocational rehabilitation services, within five years after the date of the injury upon the ground that the original injury has caused new and further disability or that the provision of vocational rehabilitation services has become feasible because the employee's medical condition has improved or because of other factors not capable of determination at the time the employer's liability for vocational rehabilitation services otherwise terminated.
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sections 5803[6] and 5804,[7] citing *Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 955–957 (*Nicky Blair's Restaurant*) (independent medical examiner's opinion of condition at time of prior award not new evidence of "new and further disability" or "good cause"). The City maintains that although it failed to raise the issue of jurisdiction at trial, that issue could be raised even on appeal under *Consolidated Theatres* and *Summers*. The City also contends that the increased permanent disability is subject to apportionment under sections 4663 and 4664(b) and *Vargas*. The City claims that permanent disability was never apportioned by the previously awarded right knee disability or the degenerative disease of the knees, and the prior awards will remain unchanged. Although the prior stipulated awards were initially raised in the City's posttrial brief, the awards are subject to judicial notice, and Johnson was aware of the awards and is not prejudiced.

Johnson answers that the WCJ correctly concluded that the petition to reopen was timely and the City failed to meet its burden of proof regarding apportionment. The WCJ

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The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407."

[6] Section 5803 provides: "The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, and the decisions and orders of the rehabilitation unit established under Section 139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor. [¶] This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated."

[7] Section 5804 provides: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition. . . ."

found that the joint findings and award was already reduced by the awarded right knee permanent disability, the same work restrictions were applicable to each knee, and Dr. Sohn's apportionment should not apply to the knees. Thus, according to Johnson, the apportionment factors were taken into consideration by the prior awards, and the current award could not be altered or reduced again by the same factors under *Vargas* and Senate Bill No. 899; otherwise, the City could deduct awards forever and rewrite Senate Bill No. 899.

DISCUSSION

Standard of Review

Factual Findings

A decision based on factual findings supported by substantial evidence is affirmed by the reviewing court, unless the findings are erroneous, unreasonable, illogical, improbable, or inequitable when viewed in light of the entire record and the overall statutory scheme.[8]

Statutory Interpretation

Interpretation of a governing statute or application of the law to undisputed facts is decided de novo by the reviewing court, even though the WCAB's construction is entitled to great weight unless clearly erroneous.[9] Generally, the Legislature's intent should be given effect and may be determined from the plain or ordinary meaning of the

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[8] *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233.

[9] *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 515–516; *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828.

statutory language.[10] Interpretation of the statutory language also should be consistent with the purpose of the statute and the statutory framework as a whole.[11]

The Joint Findings and Award

In deciding permanent disability and apportionment under the joint findings and award, the WCJ applied *Wilkinson* except to the right knee injury of March 28, 1991.[12] Generally under *Wilkinson*, successive injuries with the same employer, body part, and permanent and stationary date entitled the injured worker to the combined permanent disability and indemnity rate in effect at the time of the last injury.[13] *Wilkinson* was based on the rationale that there is no preexisting disability to apportion where both injuries become permanent and stationary at the same time under former section 4750,[14] and substantial evidence of apportionment may be lacking because of the difficulty in determining if all or part of the disability is due to one or the other of successive

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[10] *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 (*DuBois*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 (*Moyer*).

[11] *DuBois*, *supra*, 5 Cal.4th at page 388; *Moyer*, *supra*, 10 Cal.3d at page 230.

[12] We are aware that the WCAB en banc has ruled in *Benson v. The Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620 (review granted June 26, 2008, A120462) that by repealing former section 4750 (see fn. 14, *post*) and enacting sections 4663 and 4664, the Legislature intended to nullify *Wilkinson* except in cases where substantial evidence does not support apportionment. But the joint findings and award is final, as pointed out by the WCJ.

[13] *Wilkinson*, *supra*, 19 Cal.3d at page 494; *Nuelle v. Workers' Comp. Appeals Bd.* (1979) 92 Cal.App.3d 239, 249 (adjudicated specific injuries and cumulative injury with same body part, employer and permanent and stationary date).

[14] Former section 4750 stated: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

injuries.[15] *Wilkinson* has been extended to injuries with related body parts[16] and successive injuries with different employers.[17] In addition, *Wilkinson* has been applied even if there was a jurisdictional time bar against reopening a prior injury, where the same permanent and stationary date was found when the WCAB had jurisdiction.[18] But where adjudication of the prior disability and permanent and stationary date had become final, the WCAB was determined to have exceeded its jurisdiction by finding the same permanent and stationary date more than five years from the date of the prior injury; thus, permanent disability had to be apportioned by the prior disability.[19]

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[15] *Fullmer v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 164, 166 (*Fullmer*) (*Wilkinson* applied to knee injuries with different employers and same permanent and stationary date); *Rumbaugh v. Workers' Comp. Appeals Bd.* (1978) 87 Cal.App.3d 907, 915 (*Rumbaugh*) (*Wilkinson* applied where same employer for specific and part of cumulative injury with other employers).

[16] *Parker v. Workers' Comp. Appeals Bd.* (1992) 9 Cal.App.4th 1636, 1644–1646 (successive injuries to right and left knee different body parts under schedule for rating permanent disabilities not combined under *Wilkinson* even though same permanent and stationary date), citing *Reilli v. Workers' Comp. Appeals Bd.* (1982) 134 Cal.App.3d 721; *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618, 625–629 (disability from specific and cumulative back injuries combined under *Wilkinson* and contemporaneous cumulative stomach injury rated together as single injury and not as successive injuries with overlapping work restrictions).

[17] *Fullmer*, *supra*, 96 Cal.App.3d at pages 168–170; *Rumbaugh*, *supra*, 87 Cal.App.3d at pages 914–917.

[18] *Stoiber v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 1403, 1404, 1409–1410 (*Stoiber*) (where petition to reopen more than five years from one of two injuries adjudicated under *Wilkinson*, indemnity paid for number of weeks based on disability caused by first injury at rate under initial award followed by weekly rate at combined disability of 100 percent); *Harold v. Workers' Comp. Appeals Bd.* (1980) 100 Cal.App.3d 772, 785, 787–788 (*Harold*) (where prior injury disability and same permanent and stationary date for successive injury final, first 130 indemnity payments at $52.50 per week followed by 219.5 indemnity payments at $70 per week).

[19] *Department of Education v. Workers' Comp. Appeals Bd.* (1993) 14 Cal.App.4th 1348, 1353–1354, 1357–1359 (*Dept. of Education*) (percentage of prior disability subtracted from percentage of total disability where prior disability and
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We must first determine which injuries, permanent disability, and apportionment were decided under the joint findings and award of May 9, 2001, in order to decide whether any of the adjudicated injuries may be reopened and the increased permanent disability is subject to apportionment under section 4663 or section 4664(b) and *Vargas*.

The Previously Awarded Right Knee Disability

The City contends that the previously awarded right knee disability was never applied to the total level of permanent disability or joint findings and award. We disagree because the WCJ's finding that permanent disability under the joint findings and award was apportioned by the previously awarded right knee disability is supported by substantial evidence.

The WCJ's rating instructions and the joint findings and award reflect that *Wilkinson* was applied to the various injuries which became permanent and stationary in 1999 according to Dr. Sohn,[20] except the right knee injury which became permanent and stationary on January 5, 1994, according to Dr. Angerman. The right knee disability and permanent and stationary date became final under the prior award when there was no

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permanent and stationary date final and WCAB exceeded jurisdiction by finding same permanent and stationary date more than five years from date of prior injury); *Liberty Mut. Ins. Co. v. Workers' Comp. Appeals Bd.* (1981) 118 Cal.App.3d 265, 274–277 (*Liberty Mutual*) (*Wilkinson* applied to subsequent injuries permanent and stationary at same time but not to prior injury where awarded disability and permanent and stationary date final).

[20] Although *Wilkinson* generally applied to the same body part and the rating instructions and joint findings and award applied to different body parts, the joint findings and award is final, as noted by the WCJ. The WCJ added that the City should have also petitioned for reconsideration of its objection to merger of the injuries and disability under section 3208.2 ("When disability . . . results from the combined effects of two or more injuries . . . questions of fact and law shall be separately determined with respect to each such injury") and section 5303 ("no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury").

petition to reopen within five years after the date of injury. Thus, the total percentage of permanent disability under the joint findings and award should have been apportioned by subtracting the percentage of the previously awarded right knee disability,[21] and the WCAB correctly determined that permanent disability under the joint findings and award was apportioned in this manner.[22]

The Left Knee Disability

The City claims the left knee disability was not apportioned. We disagree.

The WCJ found that the joint findings and award included work restrictions for the left knee, which were the same as for the right knee. These findings by the WCJ are supported by substantial evidence. Dr. Sohn's reports and the WCJ's permanent disability rating instructions show that the same work restrictions applied to each knee, which were rated as separate parts of the body. Although the resulting permanent disability rating involved only the spine and shoulder, the WCJ explained that the left knee work restrictions were completely overlapped by the work restrictions for the spine. If the second injury impairs the employee's ability to perform work in the same manner as the first injury, apportionment of permanent disability to the extent the two injuries overlap is proper.[23] Thus, the left knee injury of September 6, 1994, work restrictions and apportionment were determined under the joint findings and award.

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[21] *Dept. of Education*, *supra*, 14 Cal.App.4th at pages 1357–1359; *Liberty Mutual*, *supra*, 118 Cal.App.3d at pages 274–275.

[22] See *Stoiber*, *supra*, 5 Cal.App.4th at pages 1409–1410; *Harold*, *supra*, 100 Cal.App.3d at pages 787–788.

[23] *Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 711, 714–716 (percentage of overlapping disability subtracted from percentage of combined disability); *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114–1116 (*Kopping*) (employer has burden to prove apportionment including overlap of disabilities from separate injuries under section 4664).

The Previously Awarded Disability for the Injuries of July 25, 1975, and July 31, 1987

The City makes a further claim of a failure to apportion by the disability awarded for the injuries of July 25, 1975, and July 31, 1987. The City's position has no merit.

The WCJ determined that the previously awarded disability for the injuries of July 25, 1975, and July 31, 1987, had been medically rehabilitated. Apportionment to a prior injury and disability was not proper if the injured worker was medically rehabilitated from the disabling effects of the prior injury at the time of the subsequent injury.[24]

Again, there is substantial evidence that supports the findings of the WCJ. Dr. Sohn's reports and the WCJ's permanent disability rating instructions did not provide for apportionment of the spine and shoulders disability by the disability awarded for the injuries of July 25, 1975, and July 31, 1987. And the City admitted in its posttrial brief that no apportionment was allowed because Johnson had been medically rehabilitated from these prior injuries, as noted by the WCJ. Generally, a concession by counsel at trial or judicial admission eliminates the need to prove the fact or issue admitted and is

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[24] *State Compensation Ins. Fund v. Industrial Acc. Com.* (1963) 59 Cal.2d 45, 56 (back injury compensable only to extent no overlap of work restrictions with prior neck injury and earning capacity or ability to compete further reduced); *Robinson v. Workers' Comp. Appeals Bd.* (1981) 114 Cal.App.3d 593, 602–603 (no apportionment under former section 4750 despite prior award of permanent disability where injured worker medically rehabilitated between first and second injury).

We are aware that medical rehabilitation of previously awarded permanent disability may no longer preclude apportionment under section 4664(b) (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1327–1328 (*Brodie*) [repeal of section 4750 did not change subtraction of prior injury or non-industrial permanent disability percentage from permanent disability percentage after industrial injury under *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1]; *Kopping*, *supra*, 142 Cal.App.4th at p. 1115), but we note again, as did the WCJ, that the joint findings and award is final.

binding absent fraud.[25] Thus, the joint findings and award determined that Johnson had been medically rehabilitated and there was no apportionment to the disability awarded for the injuries of July 25, 1975, and July 31, 1987.

Jurisdiction to Reopen Joint Findings and Award under Sections 5410, 5803, and 5804

The City maintains that the WCJ lacked subject matter jurisdiction to award the increased permanent disability because the petition to reopen was filed more than five years after the date of injury, contrary to sections 5410, 5803 and 5804. We disagree because the City waived the statute of limitations by not raising the affirmative defense at trial.

Section 5410 and sections 5803 and 5804 provide the WCAB with continuing jurisdiction upon the filing of the proper petition within five years after the date of injury by the injured worker under section 5410 and by any party in interest under sections 5803 and 5804.[26] Section 5410 is a statute of limitations under chapter 2 of part 4 of division 4

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[25] *Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 605–606 (defense counsel's unequivocal invitation to a plaintiff's verdict in opening statement concession of liability); *Bank of America v. Lamb Finance Co.* (1956) 145 Cal.App.2d 702, 708 (no prejudice from jury denial where defense counsel conceded liability on second day of trial); *Scafidi v. Western Loan & Building Co.* (1946) 72 Cal.App.2d 550, 561–562 (counsel's admission at trial eliminated complaint allegation timely accounting requested from defendants).

[26] Sections 5410, 5803, 5804; *Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 (*Zurich Ins.*) (WCJ's notice of intention to increase awarded compensation within five years of date of injury "treated as petition to reopen," providing continuing jurisdiction); see *id.* at pages 854–855 (conc. opn. of Sullivan, J.); *Nicky Blair's Restaurant, supra*, 109 Cal.App.3d at page 954; *Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 365–370 (*Aliano*) (insurer's failure to fully and fairly investigate claim and disclose medical evidence "good cause" to reopen prior award).

of the Labor Code, which is entitled, "Limitations of Proceedings."[27] Section 5410 contains a specific grant of continuing jurisdiction to award compensation for "new and further disability" and is expressly paramount to the other statutes of limitations in the chapter, including section 5404.[28]

In contrast, sections 5803 and 5804 are found in chapter 6 of part 4 of division 4 of the Labor Code, entitled, "Findings and Awards." Sections 5803 and 5804 expressly authorize the WCAB to "rescind, alter, or amend any order, decision, or award, good cause appearing," which "includes the right to review, grant or regrant, diminish, increase, or terminate . . . any compensation awarded, upon the grounds that the disability . . . has either recurred, increased, diminished or terminated." "Good cause" to reopen a prior order, decision, or award includes "new and further disability," mistake of fact or law, inadvertence, fraud, or newly discovered evidence that was not available or known at the original hearing, is not merely cumulative, and renders the original award inequitable.[29] "Good cause" is not a mere change of opinion by a physician or the

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[27] *Zurich Ins.*, *supra*, 9 Cal.3d at pages 854–855 (conc. opn. of Sullivan, J.); *Nicky Blair's Restaurant*, *supra*, 109 Cal.App.3d at page 954; *Aliano*, *supra*, 100 Cal.App.3d at page 365.

[28] Section 5404 provides: "Unless compensation is paid within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred. The timely filing of an application with the appeals board by any party in interest for any part of the compensation defined by Section 3207 renders this chapter inoperative as to all further claims by such party against the defendants therein named for compensation arising from that injury, and the right to present such further claims is governed by Sections 5803 to 5805, inclusive."

Section 5410; *Zurich Ins.*, *supra*, 9 Cal.3d at page 857 (conc. opn. of Sullivan, J.), citing *Broadway-Locust Co. v. Ind. Acc. Com.* (1949) 92 Cal.App.2d 287, 292–293 (*Broadway-Locust Co.*) (no continuing jurisdiction where petition for permanent disability rating filed more than 245 weeks from date of injury under section 5410, later amended to five years from date of injury).

[29] *Nicky Blair's Restaurant*, *supra*, 109 Cal.App.3d at pages 955–957; *Aliano*, *supra*, 100 Cal.App.3d at page 365.

WCAB, or an attempt to relitigate the original award or issues not raised by a timely petition for reconsideration.[30]

We conclude section 5410 controls when the injured worker institutes proceedings by petitioning to reopen for increased compensation based upon "new and further disability," whether or not there was a prior award or voluntary furnishing of benefits for an earlier industrial injury.[31] "New and further disability" has been defined as a new period of temporary disability or need for medical treatment, a change from temporary to permanent disability or a gradual increase in permanent disability.[32]

Although the WCJ did not state whether section 5410 or sections 5803 and 5804 controlled, the record shows that the proceedings following the joint findings and award were primarily based on "new and further disability" under section 5410. Johnson's sole allegation in the petition to reopen was that his condition had worsened with need for further temporary and permanent disability, vocational rehabilitation benefits, and medical care, which is indicative of "new and further disability" under section 5410. Other grounds of "good cause" under sections 5803 and 5804 were not pleaded. While the parties stipulated at trial that "good cause" to reopen the case had been shown, the parties also stipulated to "new and further disability" and that the increased permanent disability reported by Dr. Sohn was 89 percent. Based on the stipulations and Dr. Sohn's opinion, the WCJ found "good cause" and "new and further disability" and awarded 89 percent permanent disability. No "good cause" other than the "new and further disability" determined by Dr. Sohn was shown or found. Therefore, the petition to

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[30] *Nicky Blair's Restaurant, supra,* 109 Cal.App.3d at pages 955–957; *Aliano, supra,* 100 Cal.App.3d at pages 365, 370.

[31] Sections 5404, 5410; *Zurich Ins., supra,* 9 Cal.3d at pages 856–857 (conc. opn. of Sullivan, J.); *Broadway-Locust Co., supra,* 92 Cal.App.2d at pages 292–293.

[32] *Nicky Blair's Restaurant, supra,* 109 Cal.App.3d at page 955; *Broadway-Locust Co., supra,* 92 Cal.App.2d at page 290.

reopen and the findings and award were based on "new and further disability" under section 5410, which controls over the more general provisions of sections 5803 and 5804.

The City contends that the WCJ was mistaken that timeliness of the petition to reopen or the lack of jurisdiction should have been raised at trial because subject matter jurisdiction is not conferred by consent, waiver, or estoppel and may be raised even on appeal.[33] We disagree.

Lack of jurisdiction in the fundamental sense means the entire absence of power by the court to hear or determine the case or entire absence of authority over the subject matter or parties, and the judgment or ruling is generally void and vulnerable to direct or collateral attack.[34] But a court's action may be in excess of jurisdiction, where pursuant to statute or judicial precedent there is no power or authority to act except in a particular manner, or without the occurrence of a certain procedural prerequisite, or to give a certain kind of relief.[35] Then, generally, the judgment or ruling is merely voidable, which should be challenged directly by appeal and may be precluded by waiver or estoppel.[36]

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[33] *Consolidated Theatres*, *supra*, 69 Cal.2d at page 721; *Summers*, *supra*, 53 Cal.2d at page 298.

[34] *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288–291 (*Abelleira*) (lack of jurisdiction to grant mandate until employers exhaust administrative remedy under Unemployment Insurance Act); *County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal.App.4th 656, 661–662 (*County of Los Angeles*) (motion to extend period to produce prisoner and avoid bond forfeiture provided jurisdiction for summary judgment against insurer; collateral attack precluded after 60-day appeal period).

[35] *Abelleira*, *supra*, 17 Cal.2d at pages 288–291; *County of Los Angeles*, *supra*, 144 Cal.App.4th at pages 661–662; *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087–1091 (probate court's failure to follow statutory procedures in appointing successor to conservator, who embezzled estate assets, triggering surety bond, in excess of jurisdiction and voidable and not void for lack of subject matter jurisdiction).

[36] *County of Los Angeles*, *supra*, 144 Cal.App.4th at pages 661–662; *Munns v. Stenman* (1957) 152 Cal.App.2d 543, 555–559 (trial court's inspection of property procedural and invited error and not in absence of jurisdiction).

Time limits such as a statute of limitations may be mandatory or jurisdictional in the fundamental sense, and rulings that are too late may be void or reversible per se.[37] But time limits are generally directory and may involve a voidable mandatory duty to perform rather than a power to be exercised, unless the Legislature has clearly expressed a contrary intent.[38] To determine the Legislature's intent, courts have considered whether the applicable statute provides a consequence or penalty which voids the untimely action or whether the purpose of the legislation is defeated if the time limit is mandatory or jurisdictional in the fundamental sense rather than directory or in excess of jurisdiction.[39] With respect to some procedural deadlines such as a statute of limitations,

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[37] *Mercer v. Perez* (1968) 68 Cal.2d 104, 118–123 (grant of new trial in personal injury case resulting in defense verdict reversed where reasons not stated as required by Code of Civil Procedure (CCP) section 657).

[38] *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1144–1151 (*Correctional Peace Officers*) (where employees may waive time limit for state personnel board to render decision concerning appeal of disciplinary action or file writ of mandate, time limit directory and not mandatory or jurisdictional under Government Code section 1867.1); *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 274–275 (*Poster*) (30-day limit to accept settlement offer under CCP section 998 directory and not mandatory or jurisdictional extended five days under CCP section 1013).

[39] *Correctional Peace Officers*, *supra*, 10 Cal.4th at pages 1145–1149; *Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1685–1687 (arbitrator's mathematical correction and amended award more than 10 days from last hearing date not prejudicial or jurisdictionally void under California Rules of Court, rule 1615(b)), citing *Koll Hancock Torrey Pines v. Biophysica Foundation, Inc.* (1989) 215 Cal.App.3d 883, 885–887 (to read 10-day period for arbitrator's decision as jurisdictional rather than directory would defeat overriding public policy of quick, fair and inexpensive resolution); *Liberty Mut. Ins. Co. v. Ind. Acc. Com.* (1964) 231 Cal.App.2d 501, 509 (failure to render decision within 30 days as required by section 5313 not loss of jurisdiction to award compensation unless expressed by Legislature even though stated mandatory and not directory under section 5800.5).

the Legislature has provided for a time limit that may be waived even for direct appeal if not raised in a timely manner.[40] That is the case here.

Section 5410 does not state that the injured worker's right to collect compensation for "new and further disability" is extinguished or the WCAB lacks continuing jurisdiction if proceedings are not instituted within five years after the date of injury. (As stated, section 5410 is a statute of limitations that is part of the chapter in the Labor Code entitled, "Limitations of Proceedings.") Rather, section 5409, which expressly applies to the periods of limitations in the same chapter, provides, "The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not to extinguish the right of the employee. Such defense may be waived. Failure to present such defense prior to the submission of the cause for decision is a sufficient waiver."

Accordingly, the running of the limitations period of five years after the date of injury does not extinguish the injured worker's right to institute proceedings to collect compensation for "new and further disability" under section 5410; it operates as a bar to the remedy, which is an affirmative defense that may be waived if not raised prior to submission at trial.[41]

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[40] *Poster, supra,* 52 Cal.3d at page 273 (statute of limitations may be waived for appeal even if timely challenge at trial would have been meritorious as matter of law), citing *Getz v. Wallace* (1965) 236 Cal.App.2d 212, 213 (civil rule that statute of limitations is personal defense which may be waived applies to complaint against corporate directors filed more than three years after assets distributed).

[41] See section 5409; *Pullman Co. v. Industrial Acc. Com.* (1946) 28 Cal.2d 379, 384–385 (employer waived statute of limitations defense to "new and further disability" claim by failing to raise date of injury prior to submission under section 5409); *Poster, supra,* 52 Cal.3d at p. 273; *Hall v. Chamberlain* (1948) 31 Cal.2d 673, 679 (time limitation to allege invalidity or irregularity of deed to state for taxes not raised to bar quiet title action); *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744–745 (statute of limitations deemed pleaded and may be established at trial in contesting cross-complaint for breach of farming contract); *Bank of America etc. Assn. v. Ames* (1936) 18 Cal.App.2d 311, 315 (trial court had subject matter jurisdiction over complaint for sums
(footnote continued on next page)

The City Waived Running of the Limitations Period under Section 5410

The WCJ determined that the City was required to raise timeliness of the petition to reopen at trial in order to avoid waiver of running of the applicable time limit or limitations period, and it failed to do so. The City admitted in its petition for reconsideration that timeliness of the petition to reopen or jurisdiction was not raised at trial. And the City stipulated at trial that Johnson had shown "good cause" to reopen his case for "new and further disability," implying that the applicable time limit or limitations period was not a bar and there was continuing jurisdiction.[42] The City also admitted in its posttrial brief that the petition to reopen was timely regarding the cases adjudicated under the joint findings and award, and apportionment should be credit for money paid rather than reduction by permanent disability percentage. Therefore, we conclude that the City waived the running of the limitations period under section 5410, and the petition to reopen provided continuing jurisdiction to reopen the injuries and permanent disability adjudicated under the joint findings and award.

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owed under contract since recovery for amount beyond statute of limitations may be had if plea of bar not raised).

[42] Similar to a judicial admission, a stipulation at trial obviates the need for proof, narrows the issues, and may be binding absent inadvertence, excusable neglect, mistake of fact or law, or fraud. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1118–1121 [counsel's stipulation no cumulative injury at mandatory settlement conference binding]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 790–792 [WCAB did not abuse discretion under section 5702 in denying withdrawal from stipulations and award based on subsequent opinion of independent medical examiner]; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 864–867 [payment of stipulation to temporary total disability indemnity transformed executory agreement into executed contract and enforcement same as formal award].)

Apportionment Under *Vargas*

The City further contends that even if the petition to reopen is deemed timely and there was continuing jurisdiction to award the increased permanent disability, the WCJ incorrectly applied *Vargas* in finding no apportionment to the degenerative disease of the knees under section 4663 and to the prior awards under section 4664(b). *Vargas* holds that sections 4663 and 4664 apply to the increased permanent disability alleged in a petition to reopen that was pending when Senate Bill No. 899 was enacted on April 19, 2004, but are inapplicable to permanent disability and apportionment previously determined by a final order, decision, or award. (See fn. 4, *ante*.) *Vargas* is in line with appellate court decisions holding sections 4663 and 4664 apply to litigation that was pending when Senate Bill No. 899 was enacted, regardless of the date of injury, but not to a final order, decision, or award, such as where the period for reconsideration or appeal has expired or the appeals process has been exhausted.[43]

Here, it is undisputed that the joint findings and award became final before Senate Bill No. 899 was enacted, and the petition to reopen is still pending. The City disputes the WCJ's determination of the permanent disability and apportionment that was finally adjudicated under the joint findings and award and is not subject to section 4663 or section 4664(b) under *Vargas*.

The Previously Awarded Right Knee Disability

As we have already determined, the City is incorrect that the permanent disability and apportionment finally adjudicated under the joint findings and award did not include

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[43] *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517, 526–531 (sections 4663 and 4664 under Senate Bill No. 899 apply to pending and not final cases unless subject to continuing jurisdiction); *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 910, 914–917 (Senate Bill No. 899 apportionment applies to cases pending for reconsideration by WCAB); *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285–288 (apportionment under sections 4663 and 4664 applies to pending litigation not final when Senate Bill No. 899 enacted on April 19, 2004).

the previously awarded right knee disability. Therefore, the WCJ is correct that the increased permanent disability alleged in the petition to reopen is not subject to duplicate apportionment by the previously awarded right knee disability under section 4664(b) and *Vargas*. The permanent disability and apportionment finally adjudicated under prior awards may not be reopened based on section 4664(b), even if the prior awards remain unchanged and there is no reimbursement of previously awarded compensation.

The Previously Awarded Shoulder Disability

Similarly, the previously awarded shoulder disability was finally determined to be medically rehabilitated under the joint findings and award, and the WCJ correctly allowed no further apportionment of the increased permanent disability under section 4664(b) and *Vargas*.

The Degenerative Disease of the Knees

The WCJ also rejected the City's claim that the *increased* knee disability should be apportioned by the degenerative disease of the knees under section 4663 and *Vargas* because the medical record indicated the disease existed since 1992, and before Senate Bill No. 899, apportionment could not be based on causation. The WCJ also found that the City failed to meet its burden to prove apportionment between knee disability before and after the joint findings and award.

We agree with the WCJ's conclusion that the joint findings and award finally adjudicated apportionment to the degenerative disease of the knees that existed before the award because apportionment could not be based solely on causation prior to Senate Bill No. 899.[44]

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[44] *Brodie*, *supra*, 40 Cal.4th at pages 1326–1327; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607, 614–615. In *Escobedo*, the WCAB en banc explained that apportionment under former section 4663 required substantial evidence that permanent disability would have occurred no later than the permanent and stationary date from the natural progression of the non-industrial condition or disease absent industrial injury. Under amended section 4663, the reporting physician is required to address apportionment of disability based on causation that differs from causation of the injury
(footnote continued on next page)

But we disagree with the WCJ's conclusion that the record also precludes apportionment to the degenerative disease of the knees that existed after the joint findings and award. Although the City did not obtain from Dr. Sohn apportionment between the *increased* knee disability caused by the degenerative disease of the knees before and after the joint findings and award, Dr. Sohn provided the approximate percentages of disability caused by the industrial injuries and degenerative disease in compliance with section 4663. And Dr. Sohn concluded that the *increased* permanent disability occurred between 2002 and 2006, which is after the joint findings and award.

Assuming the WCJ is correct that further clarification of apportionment from Dr. Sohn is nevertheless required, this case involves multiple injuries and awards, medical reports and depositions by agreed medical evaluators, and apportionment under former law and the major recent changes of Senate Bill No. 899, which is still evolving. Under the circumstances, we conclude that the City should be afforded an opportunity to demonstrate whether Dr. Sohn can provide substantial evidence of the *increased* knee disability caused by the degenerative disease of the knees after the joint findings and award.[45]

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and provide percentages of disability caused by the industrial injury versus other factors. The other factors may include factors that formerly could not support apportionment, such as pathology, including degenerative disease of a joint, asymptomatic prior conditions, and retroactive prophylactic conditions. The injured worker has the burden to prove the percentage of disability caused by the industrial injury, and the employer has the burden to prove the percentage of disability caused by other factors.

[45] See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 (where WCJ believed stress at work caused industrial psychiatric injury rather than paranoid delusion indicated by employer's reporting physician and agreed medical examiner in psychiatry, sections 5701 and 5906 authorize further development of record to enable complete adjudication of issues consistent with due process).

DISPOSITION

The WCAB's decision is affirmed in part and annulled in part. The matter is remanded to determine apportionment of the increased knee disability by the degenerative disease of the knees that existed after the joint findings and award and for further proceedings consistent with this opinion. The parties shall bear their own costs.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.